IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.1002 OF 2002

IN

ARBITRATION PETITION NO.110 OF 2002

...

Oil & Natural Gas Corporation Ltd. ...Appellants

v/s.

Saw Pipes Ltd. ...Respondents

...

Mr.Gaurav Joshi with Mr.P. Shinde i/b M.Dhruva & Co. for the Appellants.

Mr.E.P.Bharucha, Sr.Counsel with Mr.Vinay Bhate, Ms.Rajni Divekar & Nandiniee Mayekar i/b Little & Co. for the Respondents.

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CORAM: D.K.DESHMUKH &

J.H.BHATIA, JJ.

DATED: 31ST OCTOBER, 2007

P.C.:

1. By this Appeal the Appellants challenge the order 30-7-2002 passed by the learned single Judge of this court in Arbitration Petition No.110 of 2002. That petition was filed by the present Appellants under Section 34 of the Arbitration & Conciliation Act, 1996 challenging the award made by the arbitral tribunal dated 4th December, 2001. Admittedly there was a contract entered into between the Appellants on one hand and a consortium consisting of P.J.Pipes and Vessels Ltd. and the Respondents-Saw Pipes Ltd. The dispute arose out of the contract. Admittedly, there was an arbitration clause. The arbitration clause was invoked by letter dated 25th March, 1996. Thereafter there was correspondence between the parties. The letter invoking the arbitration clause was kept under suspension. There were negotiations

between the parties. Some of the claims between the Appellants and the other member of the consortium namely P.J.Pipes were settled. A notice invoking the arbitration clause was revived by letter dated 30th September, 1997.

2. Thereafter, the arbitral tribunal was constituted. Before the arbitral tribunal several objections were raised including that the invocation of the arbitration clause is not within the period of limitation. The arbitral tribunal overruled all the objections and passed the award in favour of the Respondents-Saw Pipes.

3. That award was challenged before the learned single Judge. The learned single Judge dismissed the petition. The present appeal is, therefore, directed against the award and the order of the learned single Judge.

4. The first point that was urged before us was that the arbitration clause was invoked by notice dated 25th March, 1996. That notice was withdrawn unconditionally by the consortium and the ONGC-Appellants have agreed to hold negotiations and

consider the claims. Thereafter, again a notice was issued on 30th September, 1997. It is claimed that the cause of action for invoking arbitration clause accrued last in the month of April,1993, therefore, the invocation of the arbitration clause by letter dated 30th September, 1997 was barred by law of limitation. Another submission made in this regard was that the arbitration clause was invoked by letter dated 25th March, 1996 by both the members of consortium to the contract, however, the letter dated 30th September, 1997 is written only by the Respondents. It was claimed that reinvocation by letter dated 30th September, 1997 by the Respondents is, therefore, not proper.

5. Perusal of the award shows that the learned arbitrators after referring to the correspondence that was exchanged between the parties have held that it cannot be said that the letter dated 25th March, 1996 was withdrawn by the consortium. The arbitrators have held that from the correspondence exchanged between the parties, it appears that the consortium had agreed not to proceed further with the invocation of the arbitration clause as the ONGC had agreed to consider their claims. The arbitral

tribunal has, therefore, held that the invocation of the arbitration clause was on 25th March, 1996 and not by letter dated 30th September, 1997. The learned single Judge reconsidered the entire correspondence on record and held that the arbitrators were justified in holding that the claim is not barred by the law of limitation. The learned counsel for appellants took us through the entire correspondence on record. After going through the correspondence on record we find that the view that has been taken by the arbitrators and which has been confirmed by the learned single Judge is a possible view of the correspondence on record and therefore, we will not be justified in disturbing the award considering the limited jurisdiction that is conferred on court by Section 34 of the Act.

6. Next submission which was made was that according to the terms in the contract the rate of foreign exchange conversion as per the contract to be considered was as prevalent on the date on which the bill of lading was received i.e. when actual supply was received. According to the Appellants, there was correspondence between the parties for variation in this clause of the contract. It became necessary to

seek variation in the term of the contract because when the contract was entered into it was not disclosed by the Respondents that they are enjoying any credit facility from the manufacturer from whom the purchase was to be made. As a result of which the Respondents enjoyed the credit facility of 180 days. It was submitted that because of this credit facility, the contractor-Respondents were claiming payment at the rate of exchange that existed on the date of actual payment, and therefore, according to the ONGC they proposed to consider the rate of foreign exchange existing on the date of bill of lading. The modification sought was that the O.N.G.C. will consider the rate of exchange prevalent on the date of supply, the rate of exchange prevalent on the date of payment and the rate of exchange prevalent on the date which is mentioned as the date of supply in the contract and shall made payment at one of the three rates which may be lowest. According to ONGC this modification in the contract was accepted by the Respondents and therefore, the ONGC was liable to make payment only as per the modified contract. The arbitrators examined the entire correspondence exchanged between the parties in relation to rates and have come to the

conclusion that the correspondence exchanged between the parties does not establish that the Respondents had agreed to the modification of the term in the contract, and therefore, the contention raised on behalf of the ONGC has been rejected and the claim has been awarded in favour of the Respondents. The learned single Judge has reexamined the entire correspondence on record and found that the conclusion reached by the arbitrators on the basis of the correspondence between the parties is a correct conclusion and therefore, no interference is called for.

6. We were also taken through the entire correspondence exchanged between the parties and after having gone through the entire correspondence we find no reason to take a view different than the one taken by the learned single Judge. The finding recorded by the arbitrators and the findings recorded by the learned single Judge on the above referred two points are essentially based on the reading of the correspondence between the parties and the terms of the contract. In our opinion, the construction placed on the correspondence between the parties by the arbitral tribunal and by the learned single Judge

cannot be termed as impossible, therefore, it will not be appropriate for us to interfere with the same.

7. It was also urged on behalf of the Appellants that the contract was entered into with the consortium. The arbitration clause was invoked by letter dated 25th March, 1996 by the consortium. But the letter dated 30th September, 1997 is written only by the Respondents. It was submitted that therefore the other part to the consortium i.e. P.J.Pipes is a necessary party to arbitration.

8. This aspect of the matter has been considered by the arbitral tribunal and after construing the terms of the contract the arbitrators have found that the contract was entered into with the consortium. The jobs to be performed by both the members of the consortium was separately specified and the claims which were made before the arbitral tribunal were all relatable to the supply for which the Saw Pipes was responsible, and therefore, other party to the consortium namely P.J.Pipes was not a necessary party. The learned single Judge has also considered the terms of the contract and has reached the same conclusion.

9. The learned Counsel appearing for the Appellants has taken us through the terms of the contract. After looking into the terms of the contract we find that though the contract was entered into with P.J.Pipes and the Respondent-Saw Pipes, the job to be performed by them and supplies to be made by them were separately specified and they were entitled to the payment independently for the supplies made by them, and it is also an admitted position that the claims that were made in March, 1996, when the arbitration clause was invoked, both the parties to the consortium had claims against the ONGC, but in the negotiations held thereafter the claims of P.J.Pipes were settled and therefore for deciding whether the Respondent-Saw Pipes is entitled to the amount for the supply made by it, presence of the other party i.e. P.J.Pipes was not necessary. In our opinion, therefore, the conclusion reached by the arbitrators which is confirmed by the learned single Judge needs no interference at our hands.

10. It was also urged on behalf of the Appellants that because the contract was entered into by two members of the consortium, they constituted a

partnership firm and it was the unregistered partnership firm. Therefore, invocation of the arbitration clause in view of the provisions of the Partnership Act is not proper.

11. This aspect has been considered in detail by the arbitrators and the learned single Judge. In our opinion, when it is an admitted fact that there was no agreement to share profits between the two members of consortium, they cannot be termed as a partnership firm. Therefore, provisions of Partnership Act are not attracted.

12. Taking overall view of the matter, therefore, we find that in the limited jurisdiction that is conferred by Section 34 of the Arbitration Act on the court to interfere with the award made by the arbitral tribunal, the award impugned before the learned single Judge could not have been disturbed and therefore, in our opinion, the learned single Judge was justified in not interfering with the award.

13. In the result, therefore, the Appeal fails and is dismissed.

14. It is common ground that the Respondents had withdrawn the amount for which the award was made on furnishing bank guarantee. In view of this judgment, the Respondents shall be entitled to cancel the bank guarantee given by the Respondents for withdrawal of the amount after a period of eight weeks from today.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)